HONORABLE JULIE SPECTOR
Department 3
Hearing Date: January 4, 2018
Hearing Time: 9:30 a.m.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

Commissioner Eric Watness, as Personal Representative of the Estate of Charleena Lyles; Karen Clark, as Guardian Ad Litem on behalf of the four minor children of decedent, Plaintiff, v. The City of Seattle, a Municipality; Jason M. Anderson and Steven A. McNew, individually, Defendants.	NO. 17-2-23731-1 SEA DEFENDANTS JASON M. ANDERSON AND STEVEN A. MCNEW'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND RELIEF REQUESTED

Under Civil Rule 56, Officers Jason M. Anderson and Steven A. McNew (hereinafter "defendant Officers" or "Officers") respectfully request that the Court dismiss all claims set forth in plaintiffs' Third Amended Complaint (hereinafter "Complaint"). Dkt. 124, filed on May 10, 2018. Plaintiffs' claims under the Washington State Constitution and Washington Law Against Discrimination have been dismissed. Dkt. 71. The only claims that remain are common law negligence and assault. Dkt. 124. Any claims the minor plaintiffs have for negligent infliction of emotional distress should likewise be dismissed. The underlying material facts are known and

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undisputed. There are two distinct time frames associated with this case; (1) events that occurred **prior** to the Officers making actual contact with Ms. Lyles at the door of her apartment (hereafter "pre-contact"), and (2) events that occurred **after** the Officers made actual contact with Ms. Lyles at the door of her apartment (hereafter "post-contact"). This motion addresses them separately.

As a matter of law, the Officers owed no legal duty to Ms. Lyles or her minor children prior to knocking on the door of her apartment and making contact on June 18, 2017. As such, plaintiffs' negligence theories, stemming from pre-contact events, should be dismissed based on the lack of a duty.

Plaintiffs' negligence theories and her claim of assault arising from events that occurred *post*-contact are barred by RCW 4.24.420. Ms. Lyles committed a felony when she attacked the Officers with a knife or knives after having lured them to her apartment by falsely reporting a cold burglary.[1] Ms. Lyles' assault and attempted murder of the Officers initiated a direct sequence of events beginning with the Officers' commands to Ms. Lyles to "get back." Ms. Lyles noncompliance with their commands directly caused the Officers to discharge their weapons, which in turn caused Ms. Lyles' death. Ms. Lyles' commission of felonies is a complete bar to all of plaintiffs' damage claims, including the derivative claims of her minor children. There are no genuine issues of material fact, and Officers Anderson and McNew are entitled to judgment as a matter of law dismissing plaintiffs' sole remaining claims of negligence and assault.

II. STATEMENT OF FACTS

The facts material to this motion are limited and undisputed.

[1] Plaintiffs concede that Ms. Lyles armed herself with a knife or knives. Dkt. 124 at ¶¶ 4.64; 4.67; 5.3; 5.10.

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1. Pre-Contact Material Facts.

Prior to June 18, 2017 neither Officer Anderson nor Officer McNew had ever heard of Ms. Lyles. They had no prior police contact with her. Plaintiffs have never alleged otherwise in the myriad versions of their Complaint, now in its fourth iteration. Dkt. 124. Simply, they had no relationship with Ms. Lyles, let alone a "special relationship" as that term is defined in the context of the exceptions to the public duty doctrine, discussed below.

On the morning of June 18, Ms. Lyles called 911 and reported that a burglary had allegedly occurred at her apartment. *Id.* at ¶ 4.32. Specifically, she reported to 911 at 8:55 a.m. that about three hours earlier she discovered that her apartment door was open and that an Xbox was allegedly missing. *Id.* Ms. Lyles requested that Seattle police officers come to her home to investigate. Kiefer Decl., Ex. A.

Officer Anderson was dispatched in response Ms. Lyles' report of a residential burglary. Dkt. 124 at ¶ 4.33. Officer Anderson reviewed the SPD contact history with respect to Ms. Lyles on his patrol car computer system to get some information to pre-fill his report. Coluccio Decl., Ex. A (Anderson Dep) at 171:16-24. Specifically, he reviewed a report describing a June 5, 2017 police encounter between Ms. Lyles and SPD Officers Legg, Bauer, and Lim. *Id.* at 171:25-172:16. Based upon this report, he concluded that safety would be best served by having an additional officer present when he made contact with Ms. Lyles. *Id.* at 171:25-172:16. Officer McNew arrived to assist shortly thereafter and Officer Anderson briefed him on Ms. Lyles' SPD contact history. *Id.* at 171:25-172:16; Ex. B (McNew) 76:10-77:6; Hirjak Decl., Ex. A (Anderson ICV) at 0:00-1:24; Ex. B (McNew ICV)

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at 0:00-1:22.[2]

The Officers proceeded to the door of Ms. Lyles' secure apartment complex and contacted her via the callbox. Coluccio Decl., Ex. A at 172:17-23; Hirjak Decl., Ex. A at 2:59-3:15; Ex. B at 3:00-3:12. Ms. Lyles answered and buzzed defendant Officers into the building. Coluccio Decl., Ex. A at 172:17-23; Hirjak Decl., Ex. A at 2:59-3:15; Ex. B at 3:00-3:12.[3] Initially, Officer Anderson thought that this call may have been related to a prior call he responded to in Ms. Lyles' apartment complex. However, once defendant Officers reached Ms. Lyles' floor, Officer Anderson realized that he had responded to a call next door to Ms. Lyles. Coluccio Decl., Ex. A at 172:25-173:6. Undisputedly, Officer Anderson and McNew had never met nor encountered Ms. Lyles prior to this call. *Id.*, Ex. B at 87:1-3.

2. Post-Contact Facts.

Ms. Lyles greeted Officers Anderson when she came to the door in response to his knock. *Id.* Ex. A at 173:7-8; Ex. B at 50:3-4; 161:15-18; Hirjak Decl., Ex. A at 4:23-4:40; Ex. B at 4:20-4:34. The Officers, in full police uniform, explained who they were and asked Ms. Lyles if they could come inside. Coluccio Decl., Ex. A at 173:8-10; Hirjak Decl., Ex. A at 4:23-4:40; Ex. B at 4:20-4:34. Ms. Lyles invited them in. Coluccio Decl., Ex. A at 173:8-10; Ex. B at 52:24-25; Hirjak Decl. Ex. A at 4:23-4:40; Ex. B at 4:20-4:34. Officers Anderson and McNew stepped inside the apartment, closed the door, and began the investigation of the cold burglary Ms. Lyles had reported to 911. Coluccio Decl., Ex. A at 173:7-17; Ex. B at 54:6-55:9; Hirjak Decl., Ex. A at 4:23-6:50; Ex. B at 4:20-6:45.

From the outset, Officers Anderson and McNew treated Ms. Lyles with respect and as a victim

[2] The citations to the In Car Video (ICV) recordings referenced herein are to the video run time and not to the timestamps on the video itself.

[3] *See also* Declaration of Travis Smith.

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of a reported crime. Coluccio Decl., Ex. A at 173:7-174:11; 207:23-208:1; Ex. B at 111:8-12; 166:19-23. As plaintiffs admit in their Complaint, "Everything started off fine and low key…No distress was noted." Dkt. 124 at ¶4.50. Upon entering the apartment, Officers Anderson and McNew asked Ms. Lyles several questions about the burglary she reported. Coluccio Decl., Ex. A at 173:7-174:11; Ex. B at 64:7-69:17. Ms. Lyles' demeanor was calm and responsive to the Officers and did not demonstrate any signs of a mental health crisis. *Id.,* Ex. B at 123:19-23; 125:17-24. Officer McNew observed the condition of the doorway, looking for signs of a forced entry. *Id.* at 59:19-61:12. There was no evidence of a forced entry to the apartment. *Id.* at 69:8-11. The Officers were led to the back bedroom of the apartment by Ms. Lyles, where she claimed the X-box was taken. *Id.*, Ex. B at 66:20-68:6; Ex. A at 173:7-174:11; Hirjak Decl., Ex. A at 6:01-6:45; Ex. B 6:01-6:43. Notably, Officers Anderson and McNew's investigation found no evidence of the residential burglary reported by Ms. Lyles on June 18, 2017.[4]

Unbeknownst to the Officers, Ms. Lyles previously placed both a sheathed and an unsheathed fixed bladed knife in the pockets of her long puffy down jacket. Biggs Decl., ¶7, Ex. A at pp. 7, 15-16. The Officers were concluding their investigation and had moved with Ms. Lyles back toward the entrance door/kitchen area of the small apartment. The peaceful and calm verbal exchange between Officer Anderson and Ms. Lyles changed instantly when she pulled out the knife—unsheathed—that she had been concealing in her right pocket and lunged towards Officer Anderson's midsection in a stabbing motion. As Officer Anderson describes it, he was writing in his notebook when he happened to

[4] This is further confirmed by the surveillance footage from the 24-hour period leading up to Ms. Lyles' report obtained from Solid Ground and released by the Seattle Police Department on June 22, 2017. *See* Dkts. 150 & 151.

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> …glance up slightly to see Ms. Lyles lunging towards me with what—all I could see was a flash of a—blade in her right hand as she was trying to stab me in the—in the abdomen right about my belt line. **She was so close that if I didn't jump back in kind of a reactionary, sucking my gut in, pushing my back back, she would have—she would have stabbed me**.

Coluccio Decl., Ex. A at 174:13-19 (emphasis added). Ms. Lyles "…was thrusting the knife directly at my (Officer Anderson) abdomen….in a forceful motion." *Id.* at 211:2, 4. Officer Anderson believed that Ms. Lyles "…intended to stab me." *Id.* at 243:23. Faced with a deadly weapon, Officer Anderson immediately drew his firearm and attempted to create some distance between himself and Ms. Lyles. *Id.* at 174:20-22. Officer Anderson also commanded Ms. Lyles to get back and called for fast back up. *Id.* at 175:17-176:2; Hirjak Decl., Ex. A at 6:50-6:58; Ex. B at 6:48-6:55.

At that point, Ms. Lyles turned her focus on Officer McNew, who was cornered in a galley style kitchen with no means of escape. Coluccio Decl., Ex. A at 176:3-10; Ex. B at 151:1-5; Hirjak Decl., Ex. A at 6:50-7:06; Ex. B at 6:50-7:04. Officer McNew drew his firearm as soon as he perceived the deadly threat and commanded Ms. Lyles to get back. Coluccio Decl., Ex. B at 142:4-5. As she wielded a knife or knives against the defendant Officers and was commanded to get back, Ms. Lyles told Officers Anderson and McNew: "Get ready, motherf___kers" as she continued to approach Officer McNew. *Id.* at 157:1-4; Hirjak Decl., Ex. A at 7:02-7:05; Ex. B at 6:58-7:01. Officer McNew radioed "We need help. (Unintelligible) a woman with two knives." Hirjak Decl., Ex. A at 7:03-7:06; Ex. B at 7:01-7:03. Ms. Lyles drew closer to Officer McNew, who felt that she may be attempting to throw the knife at him:

> …[I] had the realization that she (Ms. Lyles) may be trying to throw that weapon (the knife) over at me approximately where I was, three to four feet away. So at that time my—my concern was protecting myself should I be struck with a blade.

Coluccio Decl., Ex. B at 152:22-153:1.

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Plaintiffs concede Ms. Lyles demeanor completely changed in terms of her interaction with Officers Anderson and McNew. Dkt. 124 at ¶4.55. In addition, plaintiffs concede that Ms. Lyles was armed and had a knife in her hand during this stage of her encounter with defendant Officers. *Id.* at ¶¶4.64; 4.67; 5.3; 5.10. What's more, plaintiffs concede that that "Her [Ms. Lyles] sole focus was on Defendants McNew and Anderson." *Id.* at ¶4.55.

Officers Anderson and McNew continued to command Ms. Lyles to get back. Ms. Lyles failed to comply with defendant Officers' commands. Officers Anderson and McNew simultaneously discharged their weapons, seven shots total, all of which struck Ms. Lyles. All seven spent shell cartridges, four fired by Officer Anderson and three by Officer McNew, were discovered in the apartment directly adjacent to the area where each officer was located when they fired in rapid sequence.[5] Coluccio Decl., Ex. C at 9:19-25; 11:7-19; 12:9-20; 13:2-14; 23:16-25:3; 52:19-53:23.

Officers Anderson and McNew immediately called for backup and medics. Hirjak Decl., Ex. A at 7:11-7:32; Ex. B at 7:12-7:18. Ms. Lyles' injuries were fatal. Dkt. 124 at ¶4.67.[6] Medics and backup officers eventually arrived and secured the scene. Coluccio Decl., Ex. C at 26:20-27:23; 28:3-7. Eight knives were recovered by SPD's Crime Scene Investigation (CSI) team. *Id.* at 32:12-35:7; 35:19-25; Biggs Decl., Ex. A. The knife that had been in Ms. Lyles' hand was recovered near her body, the sheath for that knife still located in the right pocket of her down coat. A second straight

[5] The Officers anticipate that plaintiffs will focus their argument on whether Officer Anderson opened the apartment door and moved partly out of the door in the rapid sequence of events surrounding him firing his weapon. This strawman argument has no bearing on the ultimate issue of whether Ms. Lyles was in the commission of a felony – which she clearly was.

[6] Plaintiffs contend that "It is likely that she [Ms. Lyles] dropped the knife and was not holding it at the time that defendants McNew and Anderson shot and killed her." Dkt. 124 at ¶4.67. Plaintiffs can offer absolutely no evidence in support of this assertion to this Court. Further, this assertion is completely irrelevant as to whether or not Ms. Lyles was in the active commission of a felony at the time of her death.

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four-and-a-half-inch bladed knife was recovered from the left pocket of Ms. Lyles' down coat. Coluccio Decl., Ex. C at 40:13-41:2; Biggs Decl., Ex. A.

The Complaint alleges that Ms. Lyles' three children were present in the apartment during these events. Dkt. 124 at ¶4.71. Through their guardian ad litem, each has brought their own claim for damages arising from the Officers' use of their weapons. *Id.* at ¶¶ 5.1, 5.21, 5.22, 5.26, 5.27, 5.29, 6.3, 6.4, 6.5. There is no allegation that the Officers directed any actionable conduct towards them. Rather, their claims all derive from the Officers' act of shooting Ms. Lyles. As such, it is immaterial to this motion whether any child observed some or all of Ms. Lyles' attack of the Officers and their response.

III. ISSUE PRESENTED

This motion presents two issues:

(1) Should plaintiffs' pre-contact claims for negligence against the Officers be dismissed on the basis that the Officers owed no legal duty to Ms. Lyles?

(2) Should all of plaintiffs' claims of negligence and assault be dismissed under RCW 4.24.420 when it is undisputed that Ms. Lyles was engaged in the commission of a felony[7] at the time of the occurrence causing her death and the felony was a proximate cause of her death?

IV. EVIDENCE RELIED UPON

This motion is based upon the pleadings and documents on file herein, and the Declarations of Megan M. Coluccio, Detective Kimberly Biggs, Assistant Chief Stephen Hirjak, Cheryl Kiefer,

[7] RCWs 9A.28.020(1); 9A.36 et seq., and 9A.32 et seq.

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and Travis Smith with attached exhibits.[8]

V. AUTHORITY AND ARGUMENT

A. Summary Judgment Standard.

Summary judgment is the principal tool by which insufficient claims are isolated and prevented from going to trial, with the "attendant unwarranted consumption of public and private resources." *Celotex v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment should be granted, "if the pleadings, depositions . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c); *Arden v. Forsberg & Umlauf, P.S.*, 193 Wn. App. 731, 742, 373 P.3d 320, *rev. granted* 186 Wn.2d 1009, 380 P.3d 484 (2016).

"A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Arden,* 193 Wn. App. at 742 (internal citation omitted). If reasonable minds could reach but one conclusion, however, the issue may be decided on summary judgment. *Id*.; *see also Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C.*, 180 Wn. App. 689, 698-99, 324 P.3d 743 (2014). "To avoid summary judgment in a negligence case, the plaintiff must show a genuine issue of material fact on each element of negligence—duty, breach, causation and damage." *Clark County*, 180 Wn. App. at 699 (citing *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013)).

[8] The exhibits submitted with the Declarations of Detective Biggs, Assistant Chief Hirjak, Cheryl Kiefer, and Travis Smith have all been designated "Confidential" and the parties have stipulated to filing these exhibits under seal. The Stipulation and Proposed Order to Seal are filed concurrently with this motion.

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The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Marshall v. Bally's Pacwest, Inc.,* 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Here, there is no legal basis for imposing a duty on the part of the Officers before contacting Ms. Lyles. Washington law is clear on this point. Further, both the physical and testimonial evidence is undisputed, that Ms. Lyles committed felonies by attacking the Officers with a knife. Whether her intent was to just injure the officers or kill them, whether this was a felony assault and battery or an attempted murder, is immaterial. Ms. Lyles' death is a direct result of her commission of felonies and failure to follow the clear verbal commands of Officers Anderson and McNew to "get back." Under RCW 4.24.420[9], because Ms. Lyles was engaged in a commission of a felony at the time of her death, plaintiffs may not recover damages.

B. Officers Anderson and McNew Did Not Owe a Duty to Ms. Lyles Prior to Contact.

Regardless of whether a defendant is a government entity or a private party, a negligence claim is only actionable if the duty is owed to the injured plaintiff and not to the public in general. *Babcock v. Mason County Fire Dist. No. 6,* 144 Wn.2d 774, 784-85, 30 P.3d 1261, 1267 (2001). Washington law expresses this concept through the "public duty doctrine." *Id*. at 785. "Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general." *Id*. at 785. Stated another way,

[9] The statutory language is clear: "It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983." As plaintiffs have repeatedly made clear to this Court, they are not asserting a claim under Section 1983.

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absent a showing of a duty running to the injured plaintiff from municipal agents, no liability may be imposed for a municipality's failure to provide protection or services to a particular individual. *Bailey v. Town of Forks*, 108 Wn.2d 262, 265, 737 P.2d 1257 (1987).

Here, prior to contacting Ms. Lyles, neither Officer Anderson nor Officer McNew had ever met her before. It is undisputed that Officers Anderson and McNew did not have a contractual or statutorily based relationship with Ms. Lyles. No privity existed. There are four exceptions to the public duty doctrine, under which governmental agencies may acquire a special duty of care owed to a plaintiff or a limited class of potential plaintiffs: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. *Id*. at 785-86. As set forth below, none of these exceptions apply. Plaintiffs' pre-contact negligence claim is barred by the public duty doctrine.

1. The Legislative Intent Exception Does Not Apply.

The legislative intent exception to the public duty doctrine applies when a statute or regulation establishes a governmental duty and expressly identifies and protects a particular and defined class of persons. *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 930, 969 P.2d 75 (1998). To ascertain the legislative intent, courts look to the statute's declaration of purpose. *Donohoe v. State*, 135 Wn. App. 824, 844, 142 P.2d 654 (2006). "This legislative intent must be clearly expressed, not implied." *Id*.

Plaintiffs attempt to frame a negligence claim against Officers Anderson and McNew by asserting duties to "correctly read the 'caution' screen to note that there was a 'mental' caution and act accordingly per SPD policies, practices, and procedures and communicate the same," and "fully review the June 5 incident report which noted that Charleena Lyles' mental illness include

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the delusion that police were devils and members of the KKK such that mere police presence would likely escalate her to defend her children." Dkt. 124 at ¶5.1. Put simply, Officers Anderson and McNew did not owe Ms. Lyles any duty to investigate because there is no such cause of action under Washington law. *Donaldson v. City of Seattle*, 65 Wn. App 661, 675, 831 P.2d 1098 (1992).

In *Donaldson*, the plaintiff brought a wrongful death suit against the City of Seattle, alleging the City was negligent because it failed to continue investigating allegations of possible domestic violence. *Donaldson*, 65 Wn. App. at 666 and 671. While the court found the Domestic Violence Protection Act (DVPA) established a mandatory duty for police officers to arrest in certain domestic violence situations, it refused to extend a police officer's duty of care to include a mandatory duty to conduct a follow-up investigation:

> A mandatory duty to investigate … would be completely open ended as to priority, duration and intensity. Would it entail ignoring other calls for a domestic violence response, ignoring other reported crimes, ignoring response to a report of an injury traffic accident? How long does such duty continue? To the end of the officer's shift? Or is the department obligated to detail another officer to take over? Merely to state such obvious practical problems is to demonstrate the extraordinary difficulty that would follow in attempting to implement any such mandatory duty of investigation. Law enforcement must be vested with broad discretion to allocate limited resources among the competing demands.

Id. at 671-72. Finally, the court held: "Police responsibility in regard to any further investigation becomes part of their overall law enforcement function and does not generate a right to sue for negligence." *Id*. at 675.

Plaintiffs' Third Amended Complaint demonstrates the fundamental legal flaw in their pre-contact claim against the Officers. Paragraphs 4.11 through 4.31 trace a history of events from November 2015 through June 13, 2017 of which these Officers had absolutely no involvement. Nowhere in Washington law has there ever been a duty imposed on a police officer who has never

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had contact with a member of the public to, for example, carry a certain piece of equipment (a Taser for example, as alleged in Par. 5.19), review certain incident reports (as alleged in Par. 4.42), pre-plan the implementation of "appropriate tactics and strategies" (as alleged in Par. 4.43), solicit certain input from another officer on "strategies for resolving any crisis" (as alleged in Par. 4.45), or consider "all appropriate de-escalation strategies including but not limited to staying outside" of the apartment of the person calling police (as alleged in Par. 4.46). As noted in *Donaldson,* just reciting these allegations demonstrates the practical problems with imposing a mandatory legal duty on officers to carry any of them out. *Donaldson* has stood for 26 years as settled law and dictates the dismissal of plaintiffs' pre-contact claims of negligence.

Despite the *Donaldson* court's holding that the Legislature intended to create a mandatory duty to arrest under the DVPA, that legislative intent did not justify a broader exception under the public duty doctrine for a failure to investigate. Similarly, plaintiffs cannot assert any statute that expresses a legislative intent to create a mandatory duty to investigate Ms. Lyles' mental health status, and this Court should therefore dismiss this claim as a matter of law.

2. The Failure to Enforce Exception Does Not Apply.

The failure to enforce exception to the public duty doctrine applies when "(1) governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) these agents fail to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the class of person the statute intended to protect." *Vergeson*, 145 Wn. App. at 538. Again, no statutory duty exists with respect to Officers Anderson and McNew prior to their contact with Ms. Lyles. The failure to enforce exception does not apply in this case.

3. The Rescue Doctrine Exception Does Not Apply.

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The rescue exception to the public duty doctrine applies when a governmental entity or its agents "(1) undertakes a duty to aid or warn a person in danger; (2) fails to exercise reasonable care; and (3) offers to render aid and, as a result of the offer of aid, either the person to whom the aid is to be rendered, or another acting on that person's behalf, relies on this governmental offer and consequently refrains from acting on the victim's behalf." *Vergeson*, 145 Wn. App. at 539. Here, Officers Anderson and McNew were responding to Ms. Lyles' request for an investigation of a purported residential burglary. As plaintiffs assert, this was a "non-urgent 'level 3'" call, and not an emergency in which Ms. Lyles was in danger. Dkt. 124 at ¶4.33. The rescue doctrine exception does not apply in this case.

4. The Special Relationship Exception Does Not Apply.

Under the special relationship exception, a governmental entity is liable for negligence where there is (1) direct contact or privity between the public official and injured plaintiff, (2) express assurance given by the public official to the injured plaintiff, and (3) justifiable reliance by the plaintiff on such express governmental assurance. *Vergeson*, 145 Wn. App. at 539; *Chambers-Castanes v. King County*, 100 Wn.2d 275, 285-86, 669 P.2d 451 (1983).

a. Ms. Lyles did not have contact or privity with Officers Anderson and McNew.

"The term privity is used in the broad sense of the word and refers to the relationship between the police department and any 'reasonably foreseeable plaintiff.'" *Chambers-Castanes*, 100 Wn.2d at 286. However, the contact or privity must relate to whatever express assurance a plaintiff claims the defendant made. *See e.g., Chambers-Castanes*, 100 Wn.2d at 287 (privity existed between King County and the plaintiff when King County 911 dispatcher told the plaintiff that help was on the way); *Babcock*, 114 Wn.2d at 788 (privity established when firefighter told

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plaintiff the fire department would protect his belongings); *Munich v. Skagit Emergency Communication Center,* 175 Wn.2d 871, 288 P.3d 328 (2012) (assurance upon which a 911 operator may assume the assured will reasonably rely on creates a duty, where operator entered a priority two weapons call rather than a priority one emergency call where caller's neighbor was attempting to shoot him. Caller was shot to death before law enforcement arrived).

Ms. Lyles' contact with the Seattle Police Department was insufficient to create a special relationship with anyone and certainly not with these Officers. She had never called in a residential burglary before. *See generally,* Dkt. 124. Though Ms. Lyles had a history of contacts with SPD, most of those calls were reports of domestic disputes and violence. Neither Officer Anderson nor Officer McNew had ever responded to a call involving Ms. Lyles prior to the subject incident. Coluccio Decl., Ex. A at 172:24-173:6; Ex. B at 87:1-3. Officers Anderson and McNew did not undertake a duty to Ms. Lyles prior to making contact by simply responding to dispatch. *See Cummins v. Lewis County*, 156 Wn.2d 844, 854-55, 133 P.3d 458 (2006) (privity element is not satisfied merely by the act of placing a call to 911; a plaintiff is set apart from the public when she can show that there was a telephone conversation with 911 and that the dispatcher made an affirmative promise or agreement to provide assistance).

b. Officers Anderson and McNew did not give Ms. Lyles an express assurance of their response or her safety.

Officers Anderson and McNew gave no express assurances to Ms. Lyles. "A government duty cannot arise from an implied assurance." *Babcock*, 144 Wn.2d at 789. "It is only where a direct inquiry is made by an individual and incorrect information is clearly set forth by the government, the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be bound." *Meaney v. Dodd*, 111 Wn.2d 174, 180, 759

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P.2d 455 (1988).

Washington courts have defined a municipality's duty to respond is a general duty owed to all. *Cummins*, 156 Wn.2d at 858. Without evidence of a special relationship between a municipality and a plaintiff, a call to 911 does not create an exception to the public duty doctrine. *Id*. at 855. The undisputed facts unequivocally show that Officers Anderson and McNew gave no assurances to Ms. Lyles, let alone express assurances, of their response or her safety. Therefore, Ms. Lyles could not have justifiably relied on any such assurances. Because none of its elements are satisfied, the special relationship exception does not apply. Summary judgment is warranted with respect to plaintiffs' pre-contact claims.

C. All of Plaintiffs' Claims are Barred by RCW 4.24.420.

Plaintiffs' claims are completely barred under RCW 4.24.420, which provides for a "complete defense to any action for personal injury or wrongful death" when the person killed was engaged in the commission of a felony at the time of, in this case, the shooting that resulted in Ms. Lyles' death. No serious argument can be made that Ms. Lyles' attack on these Officers with the straight bladed knife depicted below was NOT, at a minimum, a felony assault.

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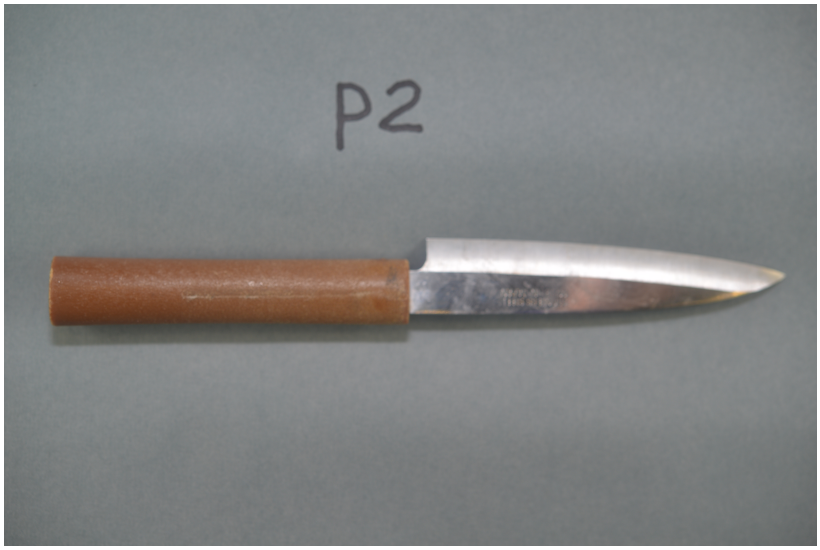

Summary judgment is warranted where a claim for damages for wrongful death if the decedent was engaged in the commission of a felony at the time of the occurrence causing the death, and the felony was a proximate cause of the death. In *Estate of Lee ex rel. Lee v. City of Spokane,* 101 Wn. App. 158, 177, 2 P.3d 979 (2000)*,* defendant officers had probable cause to arrest decedent for domestic violence. Officers came to the door with decedent's wife and decedent threatened that "two people are going to die tonight." 101 Wn. App. at 164. Decedent opened the front door to defendant officers, holding a rifle. *Id.* When the officers commanded that decedent drop the gun, he refused, instead raising it and pointing it directly at one of the officers. *Id.* The officers drew their weapons and fired once at the decedent. *Id.* Decedent was found with the gun in hand, and other guns and ammunition throughout the home. *Id.* On appeal, the trial court's denial of the defendant officer's motion for summary judgment on certain state law claims was reversed. *Id.* The appellate court held that defendant officers were statutorily immune from liability under RCW 4.24.420, because the decedent was committing a felony, first degree assault (RCW 9A.36.011) by pointing a gun at an officer and his wife after threatening to shoot them. *Id.* at 177.

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See Estate of Villarreal ex rel. Villarreal v. Cooper, 929 F.Supp.2d 1063, 1078 (2013); *Haugen v. Brosseau,* 339 F.3d 857 (9th Cir. 2003) (*rev. on other grounds,* 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004)).

Like the plaintiff' account in *Lee,* plaintiffs unequivocally concede that Ms. Lyles was wielding a knife or knives at Officers Anderson and McNew. Dkt. 124 at ¶¶4.64; 4.67; 5.3; 5.10. The physical evidence on the scene demonstrate that Ms. Lyles had another knife concealed in her left jacket pocket, as well as the sheath of the knife she held in hand while threatening and attempting to stab Officers Anderson and McNew. Biggs Decl., Ex. A.

Ms. Lyles abruptly changed her demeanor and suddenly began to attack the Officers with a knife or knives. Coluccio Decl., Ex. A at 174:13-19; Ex. B at 152:22-153:1; Dkt. 124 at ¶4.55. Ms. Lyles attempted to stab Officer Anderson in the abdomen above his belt line with a knife. Coluccio Decl., Ex. A at 174:13-19. Officer McNew, who was backed into a kitchen with no means of escape, realized that Ms. Lyles was readying to throw the knife at him with the intention of striking him. *Id.,* Ex. B at 152:22-153:1. Confronted with the threat of a deadly weapon, both officers drew their service firearms, commanded Ms. Lyles to get back, and called for fast backup. *Id.*, Ex. A at 174:13-176:2; Ex. B at 142:4-5. Ms. Lyles did more than ignore these commands. She demonstrated her intent to complete her attack by declaring words to the effect, "Get ready, mother__kers." *Id.*, Ex. B at 157:1-4; Hirjak Decl., Ex. A at 7:02-7:05; Ex. B at 6:58-7:01.[10]

[10] Whether she proclaims "Get ready, motherf__kers" or some variation of this is immaterial to this motion. What is material is that she obviously heard the Officers command her to "get back", decided not to "get back", and instead proclaimed her intent to continue her attack. Hirjak Decl., Ex. A at 7:02-7:07; Ex. B at 6:58-7:04. This is also explicit in her tone of voice and admitted "focus on the officers." Dkt. 124 at ¶4.55.

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Ms. Lyles' actions are not subject to misinterpretation. She falsely reported a residential burglary to 911. She specifically requested that a Seattle Police officer come to her home to investigate. Kiefer Decl., Ex. A; Coluccio Decl., Ex. A at 207:23-208:1; Ex. B at 54:6-13. She intentionally armed herself with two knives, concealing them in her coat pockets before Officers Anderson and McNew arrived. She greeted and spoke to Officers Anderson and McNew coherently and rationally, answering their questions as they investigated the reported burglary. *Id.,* Ex. B at 123:19-23; 125:17-24. And then, Ms. Lyles ambushed Officers Anderson and McNew.

Ms. Lyles actively and intentionally tried to stab Officer Anderson in the abdomen as he was looking down at his notebook. She disobeyed commands to "get back," moved aggressively while continuing to wield a knife or knives, turning her attention to Officer McNew, who had no means of escape, attempting to stab him and telling the officers to "get ready, mother__kers." She created a dynamic situation in which Officers Anderson and McNew faced an immediate and significant threat of death or serious injury. Coluccio Decl., Ex. B at 151:25-152:5. Because Ms. Lyles continued her attack and did not comply with clear verbal commands, Officers Anderson and McNew shot her. *Id.* at 170:17-171:16. There is no dispute but that her injuries were fatal.

Ms. Lyles committed assault in the first degree under RCW 9A.36.011 by attacking Officers Anderson and McNew with a deadly weapon, a knife.[11] In addition, Ms. Lyles committed

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[11] **Assault in the first degree.**

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

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attempted murder under RCW 9A.28.020(1), (3)[12] and RCW 9A.32 et seq. Both of the crimes Ms. Lyles was committing at the time of her death are Class A felonies. Further, because Ms. Lyles assaulted law enforcement officers who were performing their official duties at the time, she also committed assault in the third degree, a Class C felony, under RCW 9A.36.031(g). As a result of and during Ms. Lyles' commission of these felonies, she was killed. Ms. Lyles' commission of the felonies of first and third-degree assault and attempted murder are the sole proximate cause of her death. Under RCW 4.24.420, Officers Anderson and McNew are statutorily immune to plaintiffs' damages claims. *Lee,* 101 Wn. App. at 177.

D. Ms. Lyles' Commission of Felonies Voids Plaintiffs' Negligent Infliction of Emotional Distress Claims.

Plaintiffs' assert bystander claims on behalf of Ms. Lyles' children for negligent infliction of emotional distress. The bystander doctrine allows family members traumatized by witnessing the scene of injuries caused by negligent conduct directed at a loved one to recover damages for

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(c) Assaults another and inflicts great bodily harm.
(2) Assault in the first degree is a class A felony.

[12] "(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.
…
(3) An attempt to commit a crime is a:
(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;
(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;
(c) Class C felony when the crime attempted is a class B felony;
(d) Gross misdemeanor when the crime attempted is a class C felony;
(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor."

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their emotional distress. *Hegel v. McMahon,* 136 Wn.2d 122, 128, 960 P.2d 424 (1998). Generally, "the bystander theory of recovery is a collateral claim for damages suffered indirectly as the result of the defendant's breach of a duty *owed to the decedent.*" *Lee,* 101 Wn. App. at 175 (emphasis in original).

Here, to recover under a bystander theory, plaintiffs must establish that Officers Anderson and McNew breached a duty to Ms. Lyles. This claim entirely depends upon a finding of wrongful conduct by the officers. Because Ms. Lyles was in the commission of multiple felonies at the time of the shooting that led to her death, Officers Anderson and McNew are immune to liability and their conduct was not wrongful. Plaintiffs, therefore, have no cause of action for negligent infliction of emotional distress. While the fact that Ms. Lyles' children were present at the time of her commission of felonies and resultant shooting is tragic, these circumstances do not equate to liability. Plaintiffs emotional distress claims should be dismissed with prejudice.

Further, plaintiffs attempt to allege a claim of negligent assault on behalf of Ms. Lyles' children. Dkt. 124 at ¶4.75. Fundamentally, there is no such recognizable cause of action for "negligent assault." *See Aust v. Anderson,* 137 Wn. App. 1063 (2007); *Lewis v. Dirt Sports,* 259 F.Supp.3d 1039*,* 1046 (2017). As such, this claim should be dismissed with prejudice.

VI. CONCLUSION

The undisputed facts are clear: Officers Anderson and McNew had no relationship or privity with Ms. Lyles prior to their contact on June 18, 2017. It is also undisputed that Ms. Lyles suddenly attacked Officers Anderson and McNew with a knife or knives and attempted to stab and seriously injure or kill them while failing to comply with clear, verbal commands to get back before the Officers discharged their weapons. Ms. Lyles committed the felonies of assault and attempted murder of

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Officers Anderson and McNew. No reasonable jury could find otherwise. Under RCW 4.24.420, plaintiffs' claims are barred. Summary judgment is appropriate, and all claims should be dismissed with prejudice.

DATED this 7th day of December, 2018.

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I certify that this memorandum contains 6,490 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2018, I caused a true and correct copy of the foregoing document to be served upon the following in the manner indicated below:

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